OPINION OF ADVOCATE GENERAL
LÉGER
delivered on 18 May 2006 [1]

1. The present reference for a preliminary ruling seeks to ascertain whether national tax legislation according to which a retirement pension paid by a Member State to a taxpayer resident in a different Member State is subject to tax which, in certain cases, proves to be greater than that which would be payable if the taxpayer lived in the Member State paying that pension is compatible with Community law.

2. The proceedings arise from a dispute between a Finnish national, who went to live in Spain after taking retirement, and the Finnish tax authorities in relation to the rate of taxation of her retirement pension.

3. The Korkein hallinto-oikeus (Finnish Supreme Administrative Court) enquires whether the legislation at issue is compatible with Article 18 EC and with Article 39 EC, and also with Council Directive 90/365/EEC. [2]

1 — Original language: French.

2 — Directive of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ 1990 L 180, p. 28).

I — Legal framework

A — *Community law*

4. The freedom of movement for persons established by the EC Treaty was initially confined to movement to a different Member State in order to pursue an economic activity.

5. Article 39 EC, which establishes in paragraph 1 freedom of movement for workers within the Community, provides in paragraph 3(c) and (d) that the right of movement in question entails, as the case may be, the right to reside in a Member State for the purpose of carrying on employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action and, subject to the conditions set out in implementing regulations, the right to remain in the territory of a Member State after having been employed in that State.

6. Directive 90/365 extended that right of residence to persons who have ceased their occupational activity. The first subparagraph of Article 1(1) of that directive provides that Member States are to grant the right of residence to any national of a Member State who has pursued in the Community an activity as an employee or self-employed person, and to members of his family. As the third recital in the preamble to the directive indicates, that right of residence must likewise be granted to persons who have not exercised their right to freedom of movement during their working life.

7. Article 1 of Directive 90/365, however, makes exercise of that right conditional upon its holder having sufficient resources. Accordingly, the first subparagraph of Article 1(1) requires that such a person must be the recipient of an invalidity, early retirement or old-age pension or of a pension in respect of an industrial accident or disease of an amount sufficient to avoid, during his period of residence, becoming a burden on the social security system of the host Member State, and must have sickness insurance cover in respect of all risks in the host Member State. [3]

3 — Directive 90/365 has been repealed, with effect from 30 April 2006, by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

8. According to Article 2 of that directive, the right of residence is evidenced by the issue of a document known as a 'Residence permit', and the same article defines its period of validity.

9. The EU Treaty, signed in Maastricht on 7 February 1992 and which came into force on 1 November 1993, created the notion of 'citizenship of the Union'. Article 17(1) EC states that a citizen of the Union is any person who holds the nationality of a Member State.

10. Article 18(1) EC confers on every citizen of the Union the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down by the EC Treaty and by the measures adopted to give it effect.

B — *National law*

1. Legislation on the taxation of income

11. Pursuant to the Finnish tax law applicable at the time of the facts, people who have

been domiciled in Finland during the tax year are 'general' taxpayers, that is to say, they are subject to tax in that State on all their income. Conversely, taxpayers who, during the tax year, have not been domiciled in Finland have only 'limited liability' in that State, which means that they can only be liable there to tax on income received in that State.

12. Under the same law, a Finnish national is treated as resident in Finland, even if he does not live there continuously for more than six months, until three years have passed since the end of the year during which that person left the country.

13. A limited taxpayer is liable in Finland to income and property tax, unless a bilateral or international agreement binding on that Member State provides otherwise. In the absence of any such provision, the tax payable by a limited taxpayer on taxable earned income, which includes retirement pensions, is collected by means of a withholding tax of 35% of that income.

14. In contrast, tax payable by a general taxpayer is calculated on a progressive scale whereby, on the one hand, a minimum tax is levied for each band and, on the other hand, an increasing percentage is charged on the portion of income which exceeds the lower limit of the tax band.

15. In the context of the present proceedings, the Finnish Government reported that the legislation in question had been amended and that, from 1 January 2006, limited taxpayers in receipt of a pension from the Republic of Finland are subject to tax in that State on that pension in the same way as general taxpayers, on the progressive scale and with personal and family tax allowances.

2. The double taxation agreement with the Kingdom of Spain

16. According to the agreement to prevent double taxation between the Kingdom of Spain and the Republic of Finland, remuneration, including pensions, paid by one of the contracting States or one of its public-law associations or communities or by an autonomous institution or a legal person governed by public law, either directly or from funds established by them, to a natural person in respect of services which that

person has performed for that State, association, community, institution or legal person is taxable only in that State.

II — Factual background and the questions referred for a preliminary ruling

17. Ms Turpeinen is a Finnish national who worked in Finland as a youth psychiatrist in public service. After retiring in September 1998, she went to live in a different Member State, first in Belgium and then, from 1999, in Spain.

18. Ms Turpeinen's sole income is her retirement pension from the Kuntien Eläkevakuutus (local government pension insurance). By virtue of the double taxation agreement with the Kingdom of Spain, that pension is taxable only in Finland.

19. From 1999 to 2001, the Uusimaa Tax Office charged Ms Turpeinen tax on that pension at a rate of 28.5%, in accordance with the progressive taxation arrangements applicable to general taxpayers.

20. In contrast, in relation to the tax payable for 2002, the same office found that Ms Turpeinen should be treated as a limited taxpayer, since she had left the country more than three years previously. It therefore withheld at source tax of 35% on her retirement pension. Ms Turpeinen consequently paid tax of EUR 10 113.77, whereas, had she been taxed as a general taxpayer in Finland, she would have borne tax of EUR 8 173.09, plus EUR 549.03 by way of sickness insurance contributions.

21. By a decision of 3 July 2002, the Uusimaa Tax Office dismissed Ms Turpeinen's claim seeking to have her pension for the 2002 tax year calculated as in the previous three years.

22. The hallinto-oikeus (Administrative Court) dismissed the action which Ms Turpeinen brought against that decision. She challenged the decision of the hallinto-oikeus before the Korkein hallinto-oikeus.

23. The latter court stayed the proceedings and referred to the Court of Justice for a preliminary ruling.

24. In its order for reference, the Korkein hallinto-oikeus indicated that it was in doubt as to the effects of Community law in the present case because, to its knowledge, the judgments of the Court of Justice on direct taxation have not related to pensioners, but only to workers, self-employed persons, service providers or students. [4] The Korkein hallinto-oikeus also observed that the Commission of the European Communities, in a letter of formal notice sent to the Finnish Government in 2001, suggested that the 35% withholding tax might be contrary to Article 39 EC and, with regard to pensioner taxpayers, to Directive 90/365.

25. The Korkein hallinto-oikeus therefore referred the following questions to this Court for a preliminary ruling:

'(1) Is Article 18 EC, on the right of a citizen of the Union to move and reside freely in the territory of the Member States, or Article 39 EC, ensuring the freedom of movement of workers within the Community, to be interpreted as meaning that one or both of them preclude(s) national legislation under which, in the case of a person who resides abroad and is a limited taxpayer in the Member State, the withholding tax charged on the taxpayer's pension based on a public-law service relationship paid from that Member State exceeds in certain cases the tax which the taxpayer would be charged as a person resident and hence a general taxpayer in the Member State?

(2) Is Council Directive 90/365 ... to be interpreted as precluding national legislation such as that described in Question 1 above?'

III — Analysis

26. By its questions, the referring court asks essentially whether Community law precludes national legislation by virtue of which the tax applicable to a retirement pension paid to a taxpayer living in a different Member State is, in certain cases, more than the tax which the same taxpayer would have had to pay had he been resident.

4 — The referring court cites Case C-279/93 *Schumacker* [1995] ECR I-225; Case C-80/94 *Wielockx* [1995] ECR I-2493; Case C-107/94 *Asscher* [1996] ECR I-3089; Case C-385/00 *De Groot* [2002] ECR I-11819; Case C-234/01 *Gerritse* [2003] ECR I-5933; and Case C-169/03 *Wallentin* [2004] ECR I-6443.

27. There is settled case-law that, although direct taxation does not as such fall within the scope of the Community's jurisdiction, Member States must none the less exercise the powers they retain in that field consistently with Community law. [5]

28. In the present case, the referring court asks whether the legislation at issue is compatible with either Article 18 EC or Article 39 EC, with both those provisions, or with Directive 90/365. I shall start by exploring whether secondary law yields an answer to the question raised.

A — *Secondary law*

29. The Commission is of the view that the tax arrangements at issue may infringe Directive 90/365. The Spanish Government, for its part, maintains that they contravene Article 10(1) of Council Regulation (EEC) No 1408/71. [6]

1. Directive 90/365

30. As already seen, Directive 90/365 extended the right to reside in another Member State, established by the EC Treaty for economic purposes, to persons who have ceased their occupational activity, including those who have not carried on any economic activity in another Member State during their working life. That right of residence is, however, subject to the person concerned having sufficient resources not to become a burden on the social security system of the host Member State.

31. The Commission submits that the Finnish tax legislation might appear to contravene Directive 90/365 in so far as a higher taxation of pensioners living in a different Member State can make it more difficult for those pensioners to comply with the sufficient resources requirement.

32. Ms Turpeinen, a Finnish national who has ceased to work and has decided to live in Spain during her retirement, can indeed rely on Directive 90/365 as entitling her to reside in the territory of that Member State, even if she has not exercised her right of movement

5 — Case C-246/89 *Commission* v *United Kingdom* [1991] ECR I-4585, paragraph 12, and Case C-9/02 *De Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 44 and the case-law cited.

6 — Regulation of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416), as amended by Council Regulation (EC) No 307/1999 of 8 February 1999 (OJ 1999 L 38, p. 1) ('Regulation No 1408/71').

during her working life, as appears from the information provided by the referring court. However, I do not consider that directive to be relevant to the present case.

33. Directive 90/365, as its title suggests, seeks to guarantee that the host Member State will authorise the residence in its territory of any national of another Member State who has ceased employment or self-employed activities inter alia by setting out the circumstances in which the legitimate interests of the host Member State can justify a refusal and by specifying the practical arrangements for implementing that right of residence. The directive therefore expressly establishes a duty only on the part of the host Member State and it relates only to the right of residence in it.

34. I see no reason to extend the scope of that directive to include measures attributable to the State of origin, such as the Finnish legislation under analysis. Since the entry into force of the EU Treaty, the right of Community nationals who do not work to move and to reside in another Member State is conferred directly by Article 18(1) EC. [7] It is that provision which sets out to prevent 'obstacles to movement'.

35. It is that provision, in fact, which allows a Community national to enjoy, within the ambit of application of the EC Treaty, the same treatment in law as nationals in the same situation and which precludes legislation in a person's State of origin which penalises him for exercising his right of movement. [8]

36. I would point out that in *Pusa*, in which the legal and factual situation was very similar to that of the present case, [9] the Court examined the compatibility of the rules at issue with Community law only in relation to Article 18 EC.

37. My view therefore is that Directive 90/365 is not relevant in this case.

7 — Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraphs 81 to 84.

8 — Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 30, and Case C-224/02 *Pusa* [2004] ECR I-5763, paragraph 18.

9 — The case concerned a Finnish national, the recipient of a Finnish invalidity pension, who lived and paid income tax in Spain. As the result of a debt he had incurred in Finland, his pension had been the subject of attachment. Pursuant to the applicable Finnish legislation, the amount attached had been calculated so as to ensure him a minimum income, but that calculation failed to take into account the income tax he was paying in Spain.

2. Regulation No 1408/71

38. As the Spanish Government has, quite properly, observed, in proceedings for a preliminary ruling the Court may find it necessary to rule on a provision of Community law to which the referring court did not refer in its questions where it appears to the Court that the provision is relevant to determine the outcome of the main proceedings. [10] The fact that the Korkein hallintooikeus did not refer to Regulation No 1408/71 in its order for reference therefore does not prevent the Court from examining its effects if, as that government maintains, it was relevant.

39. That regulation seeks to facilitate the free movement of employed and self-employed workers and of their family members within the Community by coordinating national social security arrangements.

40. The purpose of Article 10(1) of the regulation is to ensure that the benefits to which it refers are paid to the person entitled to them where that person exercises the right to move freely. It provides that, unless the regulation provides otherwise, cash benefits, including old-age benefits, acquired under the legislation of a Member State may not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the paying institution is situated.

41. The Spanish Government asserts that the tax legislation in question contravenes that provision because the effect of the legislation is, in its view, to make the amount of the pension payable to Ms Turpeinen dependent on her residence. In support of its view, it relies on *Imbernon Martínez*. [11] Arguing from the stance which the Court took in that case, it submits that Article 10(1) of Regulation No 1408/71 would be deprived of effect if a Member State could rely on tax measures to withhold tax or make reductions on the ground that the recipient resided in a different Member State.

42. I do not share the view of the Spanish Government, for the following reasons.

43. Article 10 of Regulation No 1408/71 contributes to the establishment of free movement for workers by prohibiting 'resi-

10 — See, amongst others, Case C-513/03 *Van Hilten-van der Heijden* [2006] ECR I-1957, paragraph 26 and the case-law cited.

11 — Case C-321/93 [1995] ECR I-2821.

dence clauses'. It seeks to guarantee that the benefits it lists, such as retirement pensions, are paid to a beneficiary who has exercised his right to move freely on the same terms as if he had remained in the national territory. It therefore precludes any reduction in the amount of that pension based on the fact that its recipient lives in a different Member State.

44. In the present case, the legislation at issue does not provide for a reduction in the retirement pension paid to Ms Turpeinen because she lives abroad. The legislation does not concern the terms of entitlement to and payment of that pension.

45. The legislation in question is therefore not the same as that at issue in *Imbernon Martínez*, to which the Spanish Government refers. In that case, the contested provision of the German Law on family allowance (Bundeskindergeldgesetz) made entitlement to and the amount of a benefit for dependent children subject to residence requirements laid down in the German tax legislation. That social legislation thus referred to requirements set out in the tax legislation. It was in such a context that the Court found that the relevant provision of Regulation No 1408/71 would be largely deprived of its useful effect if a mere reference to tax provisions could be allowed to defeat it. [12] None the less, that analysis cannot, in my view, apply to the present case.

46. The facts now before the Court concern national legislation which lays down the terms for the taxation of non-resident taxpayers and which affects Ms Turpeinen's retirement pension only in so far as that pension is treated as income. It is therefore only indirectly that the legislation in question gives rise to a reduction in the amount of her disposable pension as compared to the net amount she would have received had she been resident in Finland in the 2002 tax year.

47. Furthermore, it should be observed that, if the amount of Ms Turpeinen's pension had been higher, application of the 35% flat-rate withholding tax could have produced the opposite result, that is to say, it could have left her with a greater net amount than she would have had in Finland, after paying tax on the progressive scale. That fact clearly shows that the Finnish legislation at issue does not provide for any reduction in the retirement pension payable to Ms Turpeinen by reason of the fact that she lives abroad.

12 — *Imbernon Martínez*, paragraph 23.

48. That is why, in the light of the foregoing considerations, I am of the view that the Finnish tax legislation does not contravene Article 10(1) of Regulation No 1408/71. It is therefore the rules of the EC Treaty which should be the measure by which to ascertain whether that legislation complies with Community law.

B — *The rules of the EC Treaty*

49. I shall examine first under which provision of the EC Treaty Ms Turpeinen's situation falls, then whether the Finnish tax legislation constitutes an obstacle to freedom of movement, which that provision prohibits, and, if it does, whether there is justification for that obstacle.

1. The applicable provision

50. The referring court asks this Court whether the tax arrangements in question are compatible with Article 18 EC or with Article 39 EC or with both those provisions together.

51. The Finnish Government asserts that Ms Turpeinen's situation falls within both Article 18 EC and Article 39 EC. It considers the latter provision to be applicable to the present case in the light of *Sehrer*. [13]

52. I do not agree. In common with the Italian Government and the Commission, I find that Ms Turpeinen's situation does not fall within the scope of Article 39 EC and that she can therefore rely only on Article 18 EC.

53. According to settled case-law, the status of citizen of the Union, which every national of a Member State enjoys, is destined to be the fundamental status of that national. [14] Furthermore, Article 18(1) EC confers directly on all citizens of the Union the right to move and to reside freely in the State of their choice within the Community. [15] Ms Turpeinen, as a Finnish national, is therefore able to rely on Article 18(1) EC to assert her right to reside in Spain.

54. However, the status of citizen of the Union and the rights of movement it carries

13 — Case C-302/98 [2000] ECR I-4585.

14 — *Pusa*, paragraph 16 and the case-law cited, and Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraph 25 and the case-law cited.

15 — *Baumbast and R*, paragraph 84.

with it, established by the EU Treaty, do not replace other provisions of the Treaty which refer to specific categories of person. They do not render redundant the rights of freedom of movement which the EC Treaty had already established with a view to the exercise of an economic activity. Since those rights of freedom of movement for economic purposes represent a specific expression of the rights which Article 18 EC confers generally, [16] when a Community national has exercised one of those freedoms, it is first of all in terms of that right that the Court assesses the compatibility of the relevant national legislation. [17]

55. I am not, however, of the view that Ms Turpeinen can rely on Article 39 EC.

56. For the purposes of Article 39 EC, a worker is a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration. [18] The rights to reside or stay in another Member State, which Article 39(3)(c) and (d) confers, are subject, according to the wording of those provisions, to the person concerned pursuing or having pursued such an activity in that Member State.

57. Admittedly, the scope of application of Article 39 EC is subject to broad interpretation, with the effect that it is not confined to persons effectively engaged in an ongoing employment relationship. Accordingly, as the Finnish Government points out, in *Sehrer* the Court found that the fact that a Community national is no longer in an employment relationship does not deprive him of certain guaranteed rights which are linked to the status of worker. [19] None the less, it is still necessary in the latter case for the person to have exercised the right to freedom of movement which that article provides for.

58. In *Sehrer*, the main proceedings concerned a retired person resident in Germany who had worked both in that Member State and in France and who was in receipt of a pension from each of those States. The German legislation provided that his sickness

16 — On freedom of establishment, see Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraph 22; on freedom of movement for workers, see Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 26; and on freedom to provide services, see Case C-92/01 *Stylianakis* [2003] ECR I-1291, paragraph 18.

17 — Accordingly, in Case C-85/96 *Martínez Sala* [1998] ECR I-2691, the Court of Justice examined the rights on which the person concerned could rely as a citizen only because there was doubt as to whether she was a worker. See also Case C-293/03 *My* [2004] ECR I-12013, paragraph 33.

18 — *Martínez Sala*, paragraph 32 and the case-law cited, and Case C-188/00 *Kurz* [2002] ECR I-10691, paragraph 32 and the case-law cited.

19 — *Sehrer*, paragraph 30.

insurance contributions also had to be calculated on the basis of the French pension without taking into account the fact that a significant part of that pension was already deducted in respect of sickness insurance contributions in France.

59. In that context, the Court held that the pension entitlement was intrinsically linked to the objective status of worker and that the German legislation, in so far as it imposed a double deduction of sickness insurance contributions on workers who had pursued their activities in another Member State, constituted an obstacle prohibited by Article 39 EC. [20] In such a situation, the German legislation, in so far as it placed at a disadvantage a pensioner who had carried on his occupational activities in a different Member State, was indeed capable of deterring a worker from exercising the rights of movement which the Treaty confers.

60. *Sehrer* does not, to my mind, shake the view that the right under Article 39 EC is available only to persons who have moved to another Member State in order to work. That article does not cover persons who, as seems to be what Ms Turpeinen has done, carried out all their occupational activity in their own Member State and exercised the right to reside in another Member State only once they had taken retirement, with no intention of working in that State. [21]

61. I therefore consider that it is Article 18 EC which is relevant to the present case and which Ms Turpeinen can invoke as the basis of her rights to freedom of movement and to reside in Spain.

2. Whether there is an obstacle to the freedom of movement

62. I would note, first of all, that the rights of residence and of freedom of movement which Article 18(1) EC confers on all citizens of the Union not only preclude restrictions on the exercise of those rights created by the host State. As already suggested, they also bar restrictions attributable to the State of origin.

20 — Ibid., paragraphs 30 to 35.

21 — See, in that vein, Case C-60/91 *Batista Morais* [1992] ECR I-2085, paragraph 7; Case C-134/95 *USSL n° 47 di Biella* [1997] ECR I-195, paragraph 19; and Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraphs 26 and 27.

63. The Court has held that it would be incompatible with the status of citizen of the Union and the rights of freedom of movement and residence which a citizen enjoys as such if a Community national having exercised those rights were to receive, in the Member State of which he is a national, treatment less favourable than he would enjoy if he had not availed himself of those rights. [22]

64. According to the Court, the opportunities for freedom of movement which the Treaty affords cannot be fully effective if a national of a Member State could be deterred from availing himself of them by obstacles placed in the way of his residence in the host Member State by legislation of his State of origin penalising the fact that he has used them. [23]

65. Ms Turpeinen, a Finnish national who has exercised her right to move and reside under Article 18(1) EC, can therefore rely on that article as against her State of origin.

66. Next, the case-law indicates that the status of citizen of the Union affords to nationals of the Member States who find themselves in the same situation the right to enjoy within the scope *ratione materiae* of the EC Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for. [24]

67. In the present case, it is common ground that, as a result of the tax legislation at issue, Ms Turpeinen paid more tax as a non-resident than if she had been resident in Finland.

68. It is true, as the Finnish Government observes, that, in relation to direct taxes, the situations of residents and of non-residents are not, as a rule, comparable. [25] There may be objective differences between them as regards both the source of income and the personal ability to pay tax, as well as the taking into account of personal and family circumstances.

69. The income received in the territory of a State by a non-resident is in most instances only a part of that person's total income,

22 — *D'Hoop*, paragraph 30, and *Pusa*, paragraph 18.

23 — *Pusa*, paragraph 19.

24 — See, amongst others, *Pusa*, paragraph 16 and the case-law cited.

25 — *Schumacker*, paragraph 31.

which is concentrated at his place of residence. In addition, a non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is easier to assess at the place of residence where, in general, he has the centre of his personal and financial interests. [26]

70. Accordingly, the fact that a Member State does not grant to non-residents certain tax benefits which it grants to residents is not necessarily discriminatory. [27]

71. In contrast, such different treatment based on residence must be held to be discriminatory where there is no objective difference between the situations in relation to the tax advantage in question such as to justify that different treatment. In those circumstances, both categories of taxpayer must be treated as being in the same situation as regards that advantage. [28]

72. The Court has thus held that where a non-resident taxpayer, whether employed or self-employed, receives all or almost all of his income in the State where he works, he is objectively in the same situation, so far as concerns income tax, as a resident of that State. Both are taxed in that State alone and their taxable income is the same. [29]

73. The referring court asks whether that case-law can be applied to a situation in which, as in the present case, the taxable income consists of a retirement pension.

74. My view is that it can. The Finnish tax legislation provides that retirement pensions, such as that which Ms Turpeinen receives, are taxed in the same way as any income deriving directly from an economic activity, on a progressive scale and with allowances to take into account the taxpayer's ability to pay tax and his personal and family circumstances. The present case therefore concerns a system of direct taxation, in the context of which the tax burden is determined on the basis of the claimant's ability to pay tax.

26 — *Gerritse*, paragraph 43 and the case-law cited.

27 — Ibid., paragraph 44 and the case-law cited.

28 — *Asscher*, paragraph 42.

29 — *Wielockx*, paragraph 20.

75. Moreover, as the Finnish Government points out, the arrangements for the 35% flat-rate withholding tax for non-resident taxpayers rest on the premiss that their situation is not comparable to that of resident taxpayers because they may receive other income in their State of residence, including other retirement pensions.

76. It can thus be inferred from the foregoing that where the non-resident taxpayer has no income other than the retirement pension he receives from a Member State other than that in which he lives, the State paying that pension must treat him, as regards taxation of that pension, as being in the same situation as a resident taxpayer, liable to tax on his global income. Taxpayers who, like Ms Turpeinen, have no income other than their retirement pension paid in Finland should therefore be considered, for the purposes of the taxation of their income, as being in the same situation as if they were resident in that Member State. That being so, to apply a higher rate of tax to such a non-resident taxpayer amounts to indirect discrimination incompatible with the status of citizen of the Union, posing an obstacle to the freedom of movement which Article 18(1) EC confers on that person.

3. Whether that obstacle is justified

77. According to the information provided in the order for reference, the flat-rate withholding tax arrangements which apply to the income of non-resident taxpayers were justified not only by the presumption that non-resident taxpayers receive income other than the income subject to tax in Finland. Those arrangements also sought to meet the practical requirements of simplicity and efficiency. Their purpose was, on the one hand, to facilitate the task of taxpayers who were presumed to be insufficiently familiar with Finnish and with the national tax rules under the general law, and, on the other hand, to ensure recovery of the tax.

78. I do not find either of those grounds capable of justifying the disadvantage to which non-resident taxpayers are subject. A measure which is liable to restrict the exercise of a freedom of movement guaranteed by the Treaty is justifiable only if it is appropriate to achieving the legitimate aim it pursues and does not go beyond what is necessary to attain it. [30] Simplification of the operation of the Finnish tax system for non-

30 — *De Lasteyrie du Saillant*, paragraph 49 and the case-law cited.

resident taxpayers could clearly be achieved by means of measures less disadvantageous than taxing them more heavily than resident taxpayers in receipt of the same income.

79. At the same time, the flat-rate withholding tax arrangements also appear to be disproportionate to the need to ensure effective recovery of the tax owing from non-resident taxpayers. As the Commission observes, it is open to the Member State which pays the retirement pension, under Council Directive 77/799/EEC, [31] to request the competent authorities of the Member State in whose territory the taxpayer in question resides to supply it with all the information necessary for it to know or to check the ability to pay tax and the personal and family circumstances of such a taxpayer.

80. The additional administrative difficulties which may arise, for a national tax authority, from the fact that the taxpayer lives in a different Member State cannot suffice, according to the case-law, to justify imposing on that taxpayer a higher tax burden than if he had been resident. Such arguments have repeatedly been rejected. [32] It is even less tenable in the present case, since Member States have in Council Directive 2001/44/EC, [33] which they were required to implement by 30 June 2002 at the latest, a further aid to ensure recovery of income tax owed by non-resident taxpayers.

81. In the light of all the foregoing, I propose that the Court reply to the referring court that Article 18 EC is to be interpreted as precluding national legislation whereby the tax applicable to a retirement pension paid to a taxpayer living in another Member State is, in certain cases, higher than the tax which that taxpayer would have had to pay if he had been resident, where that taxpayer's income consists exclusively or principally of that retirement pension and the taxpayer is therefore not in a situation objectively different from that of resident taxpayers.

31 — Directive of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15).

32 — See, in particular, *Schumacker*, paragraph 45, and Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 26. For a recent example, see Case C-334/02 *Commission* v *France* [2004] ECR I-2229, paragraph 31.

33 — Directive of 15 June 2001 amending Directive 76/308/EEC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties (OJ 2001 L 175, p. 17).

IV — Conclusion

82. In view of those considerations, I propose that the Court reply as follows to the Korkein hallinto-oikeus:

Article 18 EC is to be interpreted as precluding national legislation whereby the tax applicable to a retirement pension paid to a taxpayer living in another Member State is, in certain cases, higher than the tax which that taxpayer would have had to pay if he had been resident, where that taxpayer's income consists exclusively or principally of that retirement pension and the taxpayer is therefore not in a situation objectively different from that of resident taxpayers.